qualified to know as to whether he was a natural son or not and there was the evidence of a woman, Lim Kwai, who said she had acted as go-between in arranging for the adoption of the appellant. According to her he was the natural son of two people called Lee Hai and Ng Ho Nio. Such was the parol evidence.

In addition there was a quantity of documentary evidence some of which supported the appellant, some of which (the admissibility of which has been challenged) was against him.

There was a birth certificate showing him to be a natural son. There was a travel document showing him to be a natural son. But of course it is well known that it is a common practice among the Chinese community to treat adopted sons in every way as natural sons and the fact that the appellant was so treated as regards registration of his birth and as regards travel documents does not take the case very far.

Then there was a so-called document of adoption that the respondent said was found among some papers of her deceased mother. That purports to be a document executed by the natural father and mother of the appellant making him over as an adopted child to the respondent and rather curiously on the face of it it bears the date of the 8th day of the 8th moon of the 28th year of the Chinese Republic (20th September, 1939) which curiously is the first birthday (by Chinese reckoning) of the child according to the document itself and which is the same date as appears on the birth certificate which has been extracted from the Register of Births and Deaths, Pahang. That document bears the signature as attesting witness of the woman, Lim Kwai who was called and swore to it and who also swore of her own recollection of the circumstances of the adoption. This document, it has been argued, was wrongfully admitted.

Now, in the first place if this point was to be taken at all it should have been taken at the trial. It is too late to take it now. And in the second place it is a bad point because the document is clearly admissible if only to corroborate the oral evidence of the woman who signed as a witness, that is Lim Kwai. At the very lowest it is admissible by reason of sections 159 and 160 of the Evidence Ordinance to refresh her memory.

Again it has been said that certain bits and pieces of parol evidence should not have been admitted as they were hearsay. Again the point was not taken at the trial and in my view not only is it too late to take it now but it is a bad point for the evidence was not hearsay.

Finally it is said that the Judge looked at the respondent's petition for letters of administration which omitted all reference to the appellant as one of the next-of-kin. It is said that he should not have done so because that document was not produced in evidence by either party. Again, the point was not taken at the trial although at the trial the Judge made it very clear he was going to look at that document. Again it is too late to take the point now. I would, however, observe that my own view is that the point is of little importance because the document in question is of very, very little evidential value and in my own consideration of the case I would be quite prepared to disregard it.

Nevertheless disregarding that document, looking at the parol evidence as a whole and looking at the remainder of the documentary evidence I am satisfied that this Court would not be justified in interfering with the findings of Mr. Justice Suffian.

I would accordingly dismiss the appeal and while I would not disturb the order as to costs in the Court below which was that all costs should come out of the estate I am of the opinion the appellant should pay the costs of this appeal.

Before departing from the case I should make one observation. I would have made it earlier had it not been of academic interest as far as this case is concerned by reason of the order as to costs made in the Court below. It is to the effect that these proceedings should have been started by writ and not by originating summons. Theoretically they could have been started either by writ or by originating summons but it has been said again and again that when it is known there is going to be conflict of testimony and a necessity for taking parol evidence the proceedings should be commenced by writ and a plaintiff if successful may be deprived of any additional costs caused by his having commenced proceedings by way of originating summons.

Hill and **Barakbah JJ.A.** concurred.

Appeal dismissed.

Solicitors: *W. S. Chen; Bannon & Bailey.*

FOONG YIT YOON v. YAP TIAM & ANOR.

[C.A. (Thomson C.J., Hill and Barakbah JJ.A.) January 14, 1963]

[K.L. — F.M. Civil Appeal No. 41 of 1962]

Negligence — Contributory negligence — Collision between two lorries travelling at night in opposite directions — No reliable witness of accident — Evidence of position of wreckage, of the dead and injured and final position of vehicles — Doctrine of res ipsa loquitur.

The evidence in this case showed that two lorries came into collision on a broad road in conditions of perfect visibility. There was no evidence of any other vehicle having been on the road at any material time.

Held: in the absence of anything else, the balance of probability is that the drivers of both vehicles were to blame and that it is impossible to say in what proportion the blame should be allocated between them. Accordingly, the only course is to hold them blameworthy in equal proportions.

Cases referred to:—

(1) *Baker* v. *Market Harborough Industrial Co-operative Society Ltd.* [1953] 1 W.L.R. 1472.
(2) *Bray* v. *Palmer* [1953] 1 W.L.R. 1455.
(3) *France* v. *Parkinson* [1954] 1 All E.R. 739.
(4) *Ong Yam Chong & Anor.* v. *Chan Wah* [1962] M.L.J. 184, 187.

COURT OF APPEAL.

Peter Mooney for the appellant.

1st respondent no appearance.

R. H. V. Rintoul (*Mrs. M. Y. Chan* with him) for the 2nd respondent.

Cur. Adv. Vult.

Thomson C.J.: This appeal arises out of a most tragic incident that occurred shortly after 5 a.m. on 28th February, 1960, on the main Kuala Lumpur-Ipoh road at a point near Rasa village and about 34¾ miles from Kuala Lumpur.

A Mercedes lorry No: AB 4378 driven by one Mat bin Awang, who was the first defendant to the original proceedings and is the second respondent to the present appeal, was travelling from Taiping to Kuala Lumpur with a load of fish and eggs when it came into violent contact with a Bedford lorry No: BB 6326 which was proceeding in the opposite direction carrying about 25 rubber tappers from Rasa village to their places of work which lay along the main road. This lorry was driven by one Foong Kim, who is now dead and who was the second defendant to the original proceedings. His representative is the present appellant.

In consequence of the collision a large number of the rubber tappers travelling in the Bedford lorry suffered injury. Seven of them were killed outright; three others were so badly injured that they died shortly afterwards and others were injured but not fatally. One of these was a Mrs. Yap who was the plaintiff in the present proceedings.

In the event a number of actions, including the present one, were commenced against both the drivers and it is understood that the hearing of the others has been postponed until the final result of the present case is known.

Mrs. Yap sued both drivers. Her case was that the collision between the two lorries was caused by the negligence of both drivers or alternatively by the negligence of one of them. The particulars alleged of negligence were the usual ones of failing to keep a proper look-out, travelling at excessive speed, travelling on the wrong side of the road, failing to give warning of approach, and failing to take evasive action.

The first defendant denied negligence on his own part and pleaded that the collision was caused solely by the negligence of the second defendant. Alternatively, if it was caused by his own negligence the negligence of the second defendant contributed to it. The second defendant denied negligence and pleaded that the collision was caused solely by the negligence of the first defendant.

At the commencement of the trial the *quantum* of damages was agreed by all parties at $20,000 and in the event Ong J. found both parties negligent and apportioned the blame equally between them. He accordingly gave judgment for the plaintiff for $20,000 against both defendants and made an order for costs based on a contribution notice under Order 16A rule 12A which the first defendant had served on the second defendant.

Against that decision the second defendant, that is to say, the representative of the driver of the Bedford lorry, has now appealed.

At the trial the only evidence adduced for the plaintiff was the police evidence as to the collision which, apart from some evidence as to times which is not of much importance, was that of Inspector Abu Bakar who was stationed at the village of Rasa near the scene of the accident. He was awakened and was told of the accident about 5.30 a.m. and proceeded to the scene where he arrived about 5.45 a.m. There he found a state of much confusion, injured people were being assisted and there were dead bodies lying about. The only observations of importance he made at this stage were that it was still very dark and that the road was dry.

About 7 a.m. Inspector Abu Bakar commenced to make measurements and take photographs on the basis of which he prepared a rough sketch plan from which a plan to scale was later prepared by a surveyor. At the time he commenced his examination a considerable number of vehicles had passed along the road. He said it was possible that some of the bodies and other things he found might have been moved before he made his detailed examination and, of course, the injured persons had been removed.

From this Officer's evidence together with the plans and photographs it is clear what the scene of the accident looked like some two hours after it occurred. The two lorries were some 460 feet apart on a stretch of road 20 feet 9 inches wide running more or less north and south with a very gentle curve from east to west and with an almost imperceptible downhill gradient from north to south. On each side of the road surface, which was tarred, there was a hard grass side table of from 10 to 16 feet in width and there was no vegetation on either side that could interfere with visibility.

The Mercedes lorry was on the east side of the road facing south, that is to say on its proper side. The off-side front wing was buckled and the off-side lower front portion of the bodywork was broken away showing a number of broken boxes of eggs.

Some 220 feet north of this lorry there was a human skull lying on the west side of the road. Forty feet further north and on the grass about 3 feet from the west edge of the road there was a broken plank which might have come from either of the lorries. Another 40 feet further on there were a human hand and some human intestines close to the west side of the road. Another 40 feet further on was the body of a male Chinese lying on the road about 4 feet from the west edge. Thirteen feet further

on were the bodies of two female Chinese. One of these, which was headless and apparently corresponded to the skull found 130 feet further south, was on the grass about 12 inches from the west side of the road. The other, which had the head attached, was on the grass some 8 feet further from the west edge of the road. At a spot on the road about level with these two bodies and about 8 feet from the west side and 12 feet from the east side was the beginning of a trail of broken eggs and rice husks which led southwards along the road for some distance and which had clearly come from the hole in the off-side front of the Mercedes lorry.

Some 40 feet further on there were three more dead bodies. Two of these were the bodies of men and were lying just on the west edge of the road. The third, that of a woman, was lying on the road about 5 feet from the west edge. Near these bodies were some torn pieces of metal which were part of the off-side door of the Bedford lorry and two planks 11 feet 9 inches long which were the off-side sideboards of the Bedford lorry. Some 15 feet further on and about 5 feet from the west edge of the road was a brake mark which proceeded in a northerly direction for about 34 feet and was probably caused by the off-side rear wheel of the Bedford lorry and 12 feet further on the Bedford lorry itself was on the west side of the road, that is to say on its proper side, with its near-side rear wheel 3 inches off the road and its near-side front wheel 9 inches off the road. In the back was the dead body of yet another Chinese person whose sex is not clear.

The Bedford lorry was badly damaged. The off-side door and the off-side sideboards were missing, the whole body was loosened from the chassis and canted over towards the near-side, the near-side sideboards were hanging down. There was other damage which was described in detail by the Government Examiner of Vehicles who was called as a witness rather curiously not by the plaintiff but by the second defendant.

The first defendant, the driver of the Mercedes lorry, said he had been an Army driver engaged in driving ambulances and trucks and for the four years before the accident had been employed as a lorry driver by his then employers. For two years he had been driving the Mercedes lorry between Taiping and Kuala Lumpur.

The day before the accident he had slept during the day and had commenced work about 6 p.m. He assisted in loading the lorry with cases of fish and of eggs packed in rice husks till about 9.30 p.m. and then drove it to Simpang, some 3 miles from Taiping, where the lorry was re-fuelled and he had a bath and some food. The lorry left Simpang at 11.30 p.m., driven by another driver, Kim Hock, who had since died. The defendant then slept in the back of the lorry till it reached Bidor, some 90 miles from Taiping, at about 2.30 a.m. He then took over the driving and the other driver of the lorry and the lorry attendant went to sleep in the back. After driving for some 45 miles he stopped at Tanjong Malim and drank coffee. He then proceeded on his way and came to the scene of the accident, some 20 miles from Tanjong Malim, at some time between 5 and 5.30 a.m.

At the time of the accident he was travelling at about 30 miles an hour. He saw the headlights of the Bedford lorry and as the two lorries approached each other his near-side wheels were about 3 feet from the side of the road and his off-side wheels were about the middle of the road. He dipped his lights, lessened his speed on his engine compression and went as far as he could to his left. He did not apply his brakes violently because he was afraid, so he said, that if he did so his load would shift and injure the sleeping men behind nor did he go on to the grass verge of the road as he was uncertain as to its strength. His lorry came in contact with the Bedford lorry, tearing off the sideboards of the off-side of that vehicle. He ultimately came to a stop where the Police later found his lorry. He went back and found a number of people were injured and then went in a passing car to Batang Kali where he rang up the hospital at Kuala Kubu for an ambulance and reported the accident to the Police.

The driver of the Bedford lorry could not be called as a witness because, as has been said, he had died prior to the trial. There were, however, called as witnesses four Chinese women rubber tappers who were passengers on the lorry at the time of the accident.

All these women had got into the lorry at Rasa, some 2 miles south of the scene of the accident, and were being taken to their places of work along the road. There were about 25 passengers in all but at least 10 of them were dead at the time of the trial and I do not think that anything turns one way or the other on the remaining 11 not being called as witnesses. All the women who were called said that just prior to the accident their lorry was travelling at a moderate speed close to its own side of the road at distances from the edge which three of them estimated at 6 inches, 12 inches and 18 inches respectively. They saw the other lorry approaching very fast, apparently in the middle of the road. Their driver swerved to his left but was unable to avoid a collision and they were all thrown out and lost consciousness.

Clearly in the circumstances little weight was to be given to the evidence of these witnesses. One of them very candidly admitted that

she really did not know how the accident happened. Two others admitted that they did not expect a collision. In any event if the lorry had been travelling as close to the edge of the road on its own side of the road as they said it was and if it had then swerved to the left to avoid an impending collision it would have ended up with its near-side wheels much further off the road on the grass verge than they actually were.

Quite clearly the whole of the evidence that was called was inadequate to justify any detailed and confident findings as to what actually happened at the time of the accident. Moreover, evidence was not called on a number of points on which one would have expected it to be available. There was no evidence as to the presence or absence of egg stains on the Bedford lorry. There was no evidence of the presence or absence of blood stains on the Mercedes although this lorry must have been instrumental in decapitating the headless body which was found and in eviscerating another of the bodies. Again, none of the rescue workers who had been on the scene, such as the ambulance crew, were called. These people would naturally have been more concerned with attending to the injured and ascertaining which of them were and which of them were not dead than in preserving the *status quo* until daylight when the scene could be accurately plotted, and they may well have interfered with the positions of some of the things that were later observed, particularly the dead bodies. Again there was no medical evidence as to the cause of death of the dead people which might have thrown light on the question of whether they were killed instantaneously where they were found or whether they could have altered their own positions before they expired. These observations are not made in any sense by way of criticism either of the police or of the legal advisers to the parties. They are made with a view to emphasising the very great difficulty with which Ong J. was faced in arriving at any firm conclusions.

Another factor that emphasises the difficulty of the case is that a Mr. Pope, a racing motorist and motor engineer who has been well-known as an expert witness in the Courts in this country for a number of years, was called as a witness by the present appellant and was apparently unable to offer any opinion whatsoever as to how the accident happened.

Ong J., however, faced the difficulties of the case with praiseworthy resolution.

On the strength of the photographs of the two lorries after the collision showing the damage that each of them had suffered he formed the opinion that just before the moment of impact they had been driving on courses which if continued would have brought them into head-on collision, that each of them had started to turn towards its near-side away from the other before they actually touched and that the front off-side portion of the body of one struck the front off-side portion of the body of the other. With this opinion, with respect, I agree. For one thing, it accounts for the damage actually to be seen and again it accounts for the undamaged condition of the rear portion of the off-side of the Mercedes lorry.

As regards the position of the vehicles on the road at the time of the impact Ong J. thought that this must have been a few feet north of the point where the sideboards from the off-side of the Bedford lorry were found. With this opinion I am not prepared to disagree, although it does not account for the decapitated corpse being found some 45 feet further south. For myself I should be reluctant to express any opinion here except that the point probably could not be south of the point where the trail of egg shells began which it is to be observed, though this may be a coincidence, is at a level with the point where the decapitated corpse was found.

As regards the position of the vehicles in relation to the centre line of the road, Ong J. expressed no firm opinion and for myself I fail to see how he could have done but he did come to the opinion that both of them just prior to the collision were on or too close to the middle of the road. He concluded as follows:—

> "The curve was very gentle and also flattened out at its mid-section for an appreciable distance on either side of the spot where the vehicles collided. They had been visible to each other for a considerable distance, and an equal measure of care was required of both drivers in passing. Hence it is my considered opinion that a momentary inattention on the part of both drivers must have been the true explanation for their failing to give each other a sufficiently wide berth. I accordingly apportion the blame equally between the defendants and give judgment for the plaintiff."

Before us the conclusions of Ong J. were attacked on a variety of grounds.

It was said he was wrong in saying, as he did say, that the distance from what he regarded as the point of impact to the commencement of the brakemark made by the off-side rear wheel of the Bedford lorry was in the region of 35 to 40 feet. With respect I think this criticism is justified for if the scale plan is accurately drawn, and it has not been attacked, the distance in question is about 14 feet. As, however, I have been unable to see what consequences the Judge deduced from this particular measurement I cannot see how it has any very great bearing on the case.

Again, it was said that the trial Judge should have concluded that the driver of the Mercedes lorry being at the end of a long run was either

tired and inattentive or unduly anxious to get to the end of his journey whereas the driver of the Bedford lorry was probably relatively fresh. This, of course, is purely a matter of speculation.

As regards the driver of the Mercedes he was a middle-aged man whose daily work for a period of years had been to drive heavy transport lorries and at the time of the accident he had only been at the wheel of his vehicle for a little over two hours and prior to that he had been sleeping. On the other hand the driver of the Bedford was an old man in the middle sixties, who had not long previously left his bed. In the circumstances I can see no ground for supposing that either of them was likely to be more sleepy or inattentive than the other.

Again, it was said regard should have been had to the evidence of the female tappers travelling in the Bedford lorry. Ong J. did not discuss this evidence but as has already been pointed out it was clearly of very little value.

In all the circumstances I think this Court is in as good a position, or as bad a position, as the trial Judge to form a view as to what happened. My own opinion is that we are in such a bad position that we can only form a most general sort of view. All that can be said is that two lorries came into collision on a broad road in conditions of perfect visibility, that there is no evidence of any other vehicle having been on the road at any material time and that the two lorries came into collision. In the absence of anything else the case must be treated as *res ipsa loquitur* and what the *res* says, although it says it in whispered accents, is that the balance of probability is in favour of the view that the drivers of both vehicles were to blame and that it is impossible to say in what proportions the blame should be allocated between them. In the circumstances the only course open to Ong J. was the course he took, that is to say to hold them blameworthy in equal proportions.

I am, of course, fortified in this view by the cases of *Baker* v. *Market Harborough Industrial Co-operative Society Ltd.* [1] *Bray* v. *Palmer* [2] and *France* v. *Parkinson* [3] though I would with respect repeat what I said regarding these cases in the local case of *Ong Yam Chong & anor.* v. *Chan Wah* [4] that they should be treated "not ..... as laying down any rule of law but rather as illustrative of the application of principles of logic and common sense to circumstances which do not infrequently arise."

I would dismiss the appeal with costs.

Hill and **Barakbah JJ.A.** concurred.

Appeal dismissed.

Solicitors: *Bannon & Bailey; Shearn, Delamore & Co.*